UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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SIERRA CLUB,
Plaintiff,

vs. Case No. 10-CV-303-BBC

DAIRYLAND POWER
COOPERATIVE, Madison, Wisconsin
December 23, 2010
Defendant. 9:00 a.m.

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STENOGRAPHIC TRANSCRIPT OF TELEPHONIC MOTION HEARING
HELD BEFORE MAGISTRATE JUDGE STEPHEN L. CROCKER

APPEARANCES:

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THE COURT: Good morning. This is Magistrate Judge Crocker. I understand I have the attorneys for the parties in the Sierra Club lawsuit against Daryland Power Cooperative. I have a court reporter here. That's why you are on speaker phone. So let me note that our case number is 10-CV-303-BBC and let's get the appearances, please, first on behalf of the plaintiff.

MS. MCGILLIVRAY: Good morning, Your Honor. This is Pam McGillivray and with me is David Bender for Sierra Club. And I would like to say I apologize for the delay. We had a little bit of technical problems this morning with the conference call.

THE COURT: All right. Well, apology accepted. If that's the worst thing that happens to any of us today, it's going to be a good day, right? And who have we got on behalf of the defendant today?

MR. LONG: Good morning, Your Honor. This is Nash Long from Winston & Strawn. With me on the line are Liz Williamson, also from Winston & Strawn, and Vincent Mele from Wheeler, Van Sickle & Anderson.

THE COURT: All right. Well, good morning to all of you, also. Counsel, you know the drill. We've done this once before and this call will proceed much as the last one did. We are online to get additional

input from the parties on the plaintiff's motion to quash the 30(b)(6) depositions. The motion is docketed as 40. The corrective brief and supporting documents I think are 44 and 45. We've also got the response to that. I've read all of your submissions, so I have a pretty good sense of the parties' positions on this.

As is my habit, I will give you the Court's preliminary view of where I think we find ourselves and then get input from each side in turn. The bottom line, from the Court's perspective, is that I do not see the utility of these 30(b)(6) depositions at this time, and let me explain what I mean by that and why I think that.

I don't have any problem at all with the defendant, with Dairyland, trying to get this information. Certainly it's entitled to know, why did you bring this lawsuit, what's your methodology, what's your basic formula here, is it routine at the unit, routine in the industry, why did you pick the one you did; all of that. It's fair game. It's pretty much the equivalent of contention interrogatories in the form of a 30(b)(6).

However, I don't know that holding these depositions now will actually adduce any usable

evidence. And the reason that that's the Court's view at this point is that it's pellucid that the plaintiff is not intending to rely on its attorneys or its background consultants to prove its case. It is clearly stated that it's going to put out some expert reports -- I believe February 7 is the deadline -- and it's all going to be spelled out there in 26(a)(2) form. And that's what it's going to use for summary judgment, that's what it's going to use at trial.

So even if these depositions were to go forward and even if the information that Dairyland really is looking for here were to be adduced over or around any claim of work product privilege, it's not the evidence that the plaintiff would be relying on, and so I'm not sure what good Dairyland could make of it at this point.

Now, I understand the argument that you want to know now because it affects the direction of discovery in the future. But when I look at 26(b)(3)(A) and (B) and 26(b)(4)(B) and (D), I'm not sure that this is a set of depositions that are worth taking. February 7 is what, six and-a-half weeks away? We've got the intervening holidays. By this court's standards, we've given you some pretty lenient deadlines after that -- summary judgment not until May, trial on

liability not until October.

So from the Court's perspective, if we were to wait until the expert reports came out and then allow 30(b)(6) depositions on these topics if the defendant, if Dairyland, still thought they were necessary and would adduce useful evidence, fine, you know, let's try it then, but at this point I'm just not seeing the utility.

What I sense is that the responsive brief reads almost like a Rule 11 challenge to the complaint, that there is some resentment here that the Sierra Club did this and Dairyland wants to know now, rather than later, why it was hauled in to court. And that's a fair question, but I'm not sure that we're going to get admissible evidence at this point that would actually answer the question in a pragmatic, efficient, and useful way.

So that's my preliminary view, but I would not have gotten you on the phone if it were my final view; I would have just issued an order. So with that as the starting point, why don't we start with the nonmovant, with the respondent, because right now you are in the hole and you've got to find a way to dig your way out. So who has got the point on behalf of Dairyland today?

MR. LONG: Your Honor, this is Nash Long and I'll have the point and spade to try to dig out of that hole. I think to address your questions of why we need the depositions now rely primarily on two points.

As the Court noted, this information is discoverable. The basic argument that we can just wait until the expert reports and then depose the experts causes two problems: one, it will substantially delay getting this information out; and two, it's not going to provide us the full discovery of what Sierra Club, as an organization, knows. And let me address those points in turn.

Certainly the opening expert reports are due on February the 7th, but the scheduling order in the case allows for plaintiffs to file reply reports, and the reply report deadline is not until April the 18th. So if we are to depose the experts in lieu of the 30(b)(6) deposition of Sierra Club itself, we are either going to have to depose them twice, which does not seem efficient -- that is, depose them after the 7th and then again after the 18th -- or wait until the 18th of April, depose them then, which we might have to do anyway to get their final position.

THE COURT: Well, let me interrupt and ask

you this, and I apologize for digressing: Perhaps nobody has come up with a strategy yet on behalf of Dairyland, but wouldn't you be deposing them before your experts offered their reports in order to give your experts the opportunity to respond?

MR. LONG: Well, I'm not sure that we would. I'm not sure that we would want to depose the same expert twice over. I think it's more efficient to see what their final position is and ask them questions about that.

THE COURT: Okay.

MR. LONG: I think that would be the approach.

THE COURT: I was just curious. But in any event, I interrupted you, so why don't you continue, please.

MR. LONG: And the second point, in addition to the timing issue, is that there is no guarantee that the position that and the information that an expert has is coextensive with the information that Sierra Club, as an organization, has. Sierra Club has been involved in these issues for quite some time all accross the country. They have internal organizations or divisions, such as their Beyond Coal Campaign, that has developed positions on the issues. There is no

guarantee that the discoverable information the expert has will be coextensive with that of Sierra Club. That's point number two.

And I guess the final point that I would mention, Your Honor, is this: If there are discrepancies between how Sierra Club approaches an issue under the deposition notices and how an expert approaches the same issue in this case, that discrepancy is relevant and discoverable information for two reasons: one, it goes to the reasonableness of the methodology the expert will ultimately employ; and second, it goes to the credibility of the expert, which will be an issue for the jury to decide.

So I think if we allow Sierra Club to just avoid the 30(b)(6) deposition, which is what their invitation basically boils down to, we are just going to be given the position of the experts and not have the opportunity to explore other ways to address these issues that Sierra Club has developed or knows are reasonable under the regulations, and that would prevent us from getting full discovery into the credibility of the ultimate methodology that the experts might employ. So for those reasons, I think it is important for us to get Sierra Club's position and to get it now.

THE COURT: All right. Mr. Long, I don't know that if, in this case, I have announced that I don't ask rhetorical questions -- I tend to announce that in every case where we do this -- so let me ask some non-rhetorical questions.

You mentioned that one of the avenues you wish to explore in these 30(b)(6) depositions is what the Sierra Club knows sort of as an organization and getting behind or understanding the thought process behind its Beyond Coal Campaign and so forth. Why is this relevant and admissible in this case?

Isn't this case really about what happened at the plants and whether in fact we've got violations of the standards here? And isn't that just a matter of presenting some data and running some numbers as opposed to looking at the political bent or the environmental prejudices of the organization that's financing this?

MR. LONG: Your Honor, what one must do before you can run those data through those analyses is one has to decide what is the appropriate test and what is the appropriate analysis to use because you may get very different results to the question of liability depending upon the standards or the methodologies that are used to analyze those data.

And so for that reason, it is very important for us to discover what are the permissible methodologies that Sierra Club recognizes under the rules.

For example, there would be no need for agencies to issue guidance memos or interpretive rulings or statements in the Federal Register to elucidate the application of the rule if they were perfectly clear and covered all conceivable applications on their face.

In this case, for decades, the agencies, primarily EPA, has issued a series of interpretive rulings or statements about how the rules are to be applied; in other words, what are the tests that one would use to run the data through them to produce the results of liability or not. And it is a key question in this case, what are the appropriate standards to be applied, both on routine and on the emissions increase issue, to the PSD claims.

Depending upon what standards are ultimately adopted, various defenses could spring into play; for example, the fair notice due process defense. If we are correct, "we" being Dairyland, about how the rules are to be applied in this case; that is, they should be applied as they always have been and interpreted; then you will not have a fair notice or a due process

defense. However, on the other hand, if what I think to be the litigation position of Sierra Club is ultimately adopted, then additional defenses spring into play, including that one.

So I think it is critical to understand and to help the Court ultimately understand what are the analogy, what are the tests to apply to the data, to understand what are Sierra Club's positions about how routines should be interpreted, what guidance is authoritative and should be applied to that determination; and the same for emissions increase, in what areas are the actual potential tests allowed, in what areas are the other tests recognized under the rules allowed.

And for each one of those tests there are separate plausible methodologies. That's what EPA stated in that *EPA* case that we cited for the Court. And which ones of those that the Sierra Clubs agrees that are reasonable and can be employed can lead to very different answers to the question of whether there was emissions increase. And if that's the case, then you have very different questions on the issue of liability.

So I think this is not just simply a question of taking the data, running it through a series of tests.

If that was the case, you wouldn't need an expert to do it.

THE COURT: Well, Mr. long, perhaps your last statement answered the question I'm going to ask. And I apologize if it's naive, but I'm still having trouble getting around this notion of what Sierra Club believes isn't evidence. In other words, I could see where, in certain cases, the decision to employ certain methodology over others that might be preferable or more widely accepted in the field could be impeaching of a particular witness.

But when we are talking about an organization and when we are talking about particular plants, I still have this notion that what this case comes down to is the methodologies actually offered by Sierra Club as evidence, and what they don't offer as evidence isn't really impeaching directly of them. If they've made choices, they've made choices, but I'm not sure the reasons for those choices affect anything. Either they've have got the proof or they don't and they either win or lose on that basis.

So maybe I'm just asking you to repeat yourself, but have you got anything else for me on why it's important to know the *why's* of Sierra Club's decisions as opposed to simply knowing what its experts are

going to say and offer as proof in this particular case?

MR. LONG: Your Honor, it will allow us to present alternative reasonable methodologies for the jury and allow the jury to make a decision about which alternative methodology, including the alternative methodology that Sierra Club might recognize independent of litigation, are the appropriate ones to apply.

I think it is relevant to judge the credibility of the expert and the expert's selection of the methodologies and I also think it is relevant information to demonstrate the reasonableness of possible alternative methodologies that we would present to the jury for them to make the decision about whether or not these activities were major modifications.

THE COURT: Sure. And you keep talking about a jury. I think everyone has agreed to a bench trial, but your point remains valid. But let me ask one more question, and then I'm going to hear from Ms. McGillivray, because I've got more hearings yet this morning. You are not the only ones to suffer on December 23 today.

But accepting, for the purposes of today's

discussion, your point that this could be admissible and that there are other methodologies out there, two questions occur to me: (a) isn't Dairyland going to be putting its own experts and other industry witnesses before the judge, either at summary judgment or at trial, to say, well, plaintiff's experts ignored all of these other things that are actually more applicable and more widely accepted?

Apart from that, until Sierra Club commits to a position through its experts and their reports, how can you know what to impeach? In other words, what's the downside, other than the loss of time of waiting until the experts issue their reports on behalf of plaintiff and then coming back to the plaintiff and saying, well, why did you not do B, C and D; why did you pick A; and then create your impeachment record in that fashion?

MR. LONG: I think the answer -- I have three things to say in response to that: one is, yes, we will be providing -- we expect to provide our own expert testimony, but we are not going to rely solely on expert testimony -- I anticipate that we will be developing fact witness testimony -- and that answers the question of why we need to know what Sierra Club's litigation position is now.

We need to be aware of what the position is the Sierra Club developed for this case so we can be asking third parties, interviewing third parties, and possibly deposing third parties, about how the regulations have been interpreted and applied.

There could be depositions not only of EPA witnesses, but also of witnesses with the Wisconsin Department of Natural Resources in this case, and we don't want to be in a position of delaying those depositions or sealing up those depositions until we know exactly what Sierra Club's position is. We want to go ahead and start scheduling those and trying to move forward so that we are not telescoping all of that type of discovery should it be necessary at the tail end of the discovery phase of the case.

And one final point, just to clear it up, we did include a jury demand in our answer in this case, at least that was my intention and recollection. And so I do think that there is a jury demand that was made, but that's not relevant to your question. The question is, why do we need it now. And the answer is, we need to know what we are being sued about and we need to know the positions that Sierra Club has underlying those so that we can start the process of understanding whether that is consistent with the

accepted agency practice and accepted industry practice and that may involve third-party discovery.

THE COURT: Fair enough. And I have one last question and then I'm going to hear from plaintiff, but, Mr. Long, you probably got the same impression reading the plaintiff's brief that the Court did. But the impression I got is that notwithstanding the ultimate discoverability of all this information, at this point it's all based on attorney work product.

So even if this Court were to allow these depositions to go forward on these topics, what do you anticipate getting if in fact all you get at this point is objections and refusals to answer based on attorney work product?

MR. LONG: I think that there are questions that we could ask, and we detailed some of those in the brief, that would not be getting to work product. We don't need to see, you know, any handwritten notes. We don't need to see any documents that might be protected by Rule 26, which as I read it, deals primarily with the documents. We don't need the documents to understand what their position is and what guidance that they recognize as applicable and persuasive for analyzing these issues of routine and emissions increase under the PSD rules.

We are just trying to understand what tests they are coming at or what they used or what it's based on, and that doesn't necessarily imply that we have to see their actual calculations themselves for them to state their position on how it should be done.

THE COURT: All right. Well, thank you. Who has got the point on behalf of Sierra Club today?

MS. MCGILLIVRAY: This is Pam McGillivray, Your Honor.

THE COURT: All right.

MS. MCGILLIVRAY: I want to just back up because what these notices actually request is not general positions of Sierra Club and what has -- what the Beyond Coal Campaign has been doing, as suggested now by Mr. Nash. The notices are specific to the plant and the project and activities that are in this complaint. And in fact, in Dairyland's own motion for protective order, they had suggested that nothing beyond that would be relevant and the Court essentially agreed in limiting the response to the 114 requests of the EPA.

So just looking at the specific notices here, there is nothing that would suggest that Sierra Club's position on any other NSR related or understanding of guidances or regulations are actually going to be

something that we would be preparing a witness for anyway.

THE COURT: Let me interrupt you there and ask you this -- and this is sort of an irrelevant question, but it occurs to me now -- if that sort of a 30(b)(6) notice were to be sent to the Sierra Club, would you be prepared to put up a witness on those types of issues?

MS. MCGILLIVRAY: Your Honor, we didn't get that, but we would certainly object on relevancy grounds to the past position of Sierra Club in cases not involving Dairyland Power, not involving the regulations at issue in this case. I don't see that it would be relevant to this proceeding at all.

As far as any questions that go to the credibility of our experts, once they are chosen, once they are identified with their reports, certainly we would expect the defendant to depose that expert and to look into any past work with Sierra Club and their positions -- is it accurately obtained, contrary or the same as. I think that goes to the credibility of our witnesses.

We have not named Sierra Club witnesses as fact witnesses. In fact, we've told Dairyland that they have no firsthand knowledge on any of these issues.

Dairyland has submitted its initial disclosures without indicating any witnesses from Sierra Club. We really don't think that they would be called on anything other than standing issues, and that is not part of this notice either.

As far as allowing us depositions soon after February 7th, we aren't objecting to a 30(b)(6) deposition of Sierra Club altogether. It was on the basis of these notices because the information is privileged, because it is based on the analysis and calculations of counsel.

So that information, which is on document, which we have provided on a privilege log in explanation to defendants, would have to be conveyed to the client in order to provide the information so that that client could have -- be prepared for a proper 30(b)(6) deposition. That would require revealing attorney-client privileged information as well as the attorney opinion and mental impressions. That's the basis of this protective order, that information is privileged, not that it isn't relevant or not that contention interrogatories may have to be responded to.

As far as the timing of the response to contention questions, Dairyland has refused to answer

Sierra Club's interrogatories requesting its basis for its defense on the particular project at issue here. In response to interrogatories, it's stated that the objection being that contention interrogatories are better left for later in the discovery stage towards the end of discovery.

It is now wanting to hold a double standard in saying, eighth page, Sierra Club's information now but won't provide its information until later in the proceeding. And certainly, as we suggested in our motion, we are willing to hold a 30(b)(6) deposition on these issues after the discovery or after the identification of experts.

THE COURT: Well -- I'm sorry. Were you done?

MS. MCGILLIVRAY: Yes. Thank you.

THE COURT: Okay. Let me just pose a couple of informational questions to you as well. Picking up on your last point, certainly the Court would allow a 30(b)(6) deposition at whatever time is appropriate here. But if there were to be a 30(b)(6) deposition on the topics that are the subject of your motion to quash, no matter when that was held, how could your position change?

In other words, you are going to put experts

forward, your experts are going to offer their calculations and their results. At that point, if Dairyland wants to do the 30(b)(6) on the same topics, wouldn't the information still be privileged?

MS. MCGILLIVRAY: Well, Your Honor, I think that what we would use as a basis for informing the client of the topics here, which are what are the calculations and analyses that we are relying on in bringing our case forward, would be what the experts have presented, because then it would be no longer subject to -- that information, as opposed to what we did to prepare the pleadings, would not be subject to privilege.

THE COURT: All right. So as a practical matter, it would basically be an expert deposition filtered through a 30(b)(6) witness?

MS. MCGILLIVRAY: If that's what the defendants want to do, correct.

THE COURT: All right. And let me ask this as a question as opposed to offering it as a statement or a leading question: I'm inferring from what you are telling me, and I certainly inferred from your brief in support of your motion, that plaintiff's position today is that although there could have been a lot of different ways that the plaintiff developed

the information that led to this lawsuit, it happened to use an attorney and the attorney did the calculations and an attorney ran the data and the attorney gave the advice to the Sierra Club and Sierra Club filed its lawsuit on that basis. And therefore, in this particular case, on the particular path that led to the lawsuit, everything would be privileged at this point. Is that a fair characterization of your position on this one?

MS. MCGILLIVRAY: Yes, Your Honor. With the slight addition that counsel did confer with a non-testifying consultant on some of the calculations.

THE COURT: Understood.

MS. MCGILLIVRAY: That has also been provided in notice in the privilege log.

THE COURT: All right. So let me ask one more question, which requires you to make a prediction. In the event the Court were to say to you and to defendant, to Dairyland, go ahead and take the deposition, although it's not clear that anything useful will result, will any questions be answerable or is this basically going to be three pages of assertion of privilege?

MS. MCGILLIVRAY: Your Honor, it's hard to know. And I think defendant had suggested that Sierra

Club reverse course on this. The reason that we filed this motion to quash rather than go through with the deposition is because we were basically threatened with seeking sanction for refusal to attend a deposition if we advised client to assert their privileges.

Certainly we agree that facts are discoverable. We think that we provided all those facts through interrogatories, through interrogatory responses and through direct reference to Dairyland's own documents with work order numbers and with specific references to the activity, so we think we've given that information.

I do understand that, you know, that defendant is entitled to a deposition on the facts even though we have responded to interrogatories. But everything about the calculations, about the analysis, the legal conclusions, the legal strategy, would all be subject to an objection and with an instruction not to respond. So the reason that we originally contacted defendant about this issue was because we think it would be an unfruitful exercise in which there would be nothing but objections raised based on the specific matters listed in the 30(b)(6) notices.

THE COURT: Okay. Well, thank you. And I

don't need a reply from Mr. Long because I'm going to deny the motion to quash with these observations:

Frankly, I think that these would be pointless depositions. I haven't really been persuaded that my initial view is incorrect. And that view is that really there is nothing useful to be gained from deposing a 30(b)(6) witness on these topics at this time, that it would be much more useful to do this later, to depose the experts and then if necessary do the 30(b)(6).

But one of this Court's philosophies is to be as *laissez-faire* toward discovery as it can and to allow discovery as widely as it can while being fair. So I'm not going to tell Dairyland it cannot proceed with these depositions, but I will simply offer this:

We never look for trouble here in this court. We like to think that things work out appropriately and that the Court doesn't need to expect that things will turn out badly. But in the event this turns out to be a fairly pointless deposition and nothing good comes out of it and it turns out that Sierra Club was correct and Sierra Club wants to be reimbursed for the time and money, certainly it can file a motion to that effect.

Now, that's not a veiled threat to Dairyland; it

may just be that Sierra Club is wrong, that it's holding its cards too close to the chest and that it asserts the privilege incorrectly. I don't know. I don't know what's going to happen and that's why I'm not going to quash the subpoenas. That's why I'm not going to prevent these depositions from going forward. I think Dairyland is entitled to attempt to adduce the evidence it thinks will be necessary.

I don't think this is going to work, but, you know, with the understanding that the parties can always come back to court after the depositions if they think it's necessary, feel free to file motions at that time.

With that, I think we are done today, but let's double-check. Ms. McGillivray, it's your motion, so I'll check in with you first. Any questions or concerns about where we've landed?

MS. MCGILLIVRAY: No, Your Honor.

THE COURT: Okay. Mr. Long, any questions or concerns about where we've landed?

MR. LONG: No, Your Honor.

THE COURT: All right. Then we are done. Thank you all. Please enjoy your day and have pleasant holidays.

(Adjourned at 9:38 a.m.)

I, CHERYL A. SEEMAN, Certified Realtime and Merit Reporter, in and for the State of Wisconsin, certify that the foregoing is a true and accurate record of the proceedings held on the 23rd day of December, 2010, before Magistrate Judge Stephen L. Crocker, of the Western District of Wisconsin, in my presence and reduced to writing in accordance with my stenographic notes made at said time and place.

Dated this 11th day of January, 2011.

/s/

Cheryl A. Seeman, RMR, CRR
Federal Court Reporter

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